

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

No.: **ICC-02/05-03/09**  
Date: **11 October 2019**

**TRIAL CHAMBER IV**

**Before:** Judge Kimberly Prost, Presiding Judge  
Judge Robert Fremr  
Judge Reine Alapini-Gansou

**SITUATION IN THE DARFUR, SUDAN**

**IN THE CASE OF  
THE PROSECUTOR *v.* ABDALLAH BANDA ABAKAER NOURAIN**

**Public Redacted Version**

**“Response to ‘Registry’s observations on the ‘Second Update to ‘Associate Counsel’s Request to be appointed as Lead Counsel pursuant to Regulation 76 of the Regulations of the Court’’, (ICC-02/05-03/09-661-Conf-Exp)”, submitted on 19 September 2019**

**Source:** Charles Achaleke Taku, Lead Counsel for Abdallah Banda

**Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:**

**The Office of the Prosecutor**

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Mr. Julian Nicholls

**Counsel for the Defence**

Chief Charles Achaleke Taku

Mr. Anand Shah

**Legal Representatives of the Victims**

Ms. Hélène Cissé

Mr. Jens Dieckmann

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
(Participation/Reparation)**

**The Office of Public Counsel for  
Victims**

**The Office of Public Counsel for the  
Defence**

**States' Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Mr. Peter Lewis

**Counsel Support Section**

Dr. Esteban Peralta-Losilla

**Deputy Registrar**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## I. Introduction

1. Pursuant to Regulation 24(1) of the Regulations of the Court (“RoC”), Chief Charles Achaleke Taku, associate counsel (“Associate Counsel”) for Mr. Abdallah Banda Abakaer Nourain (“Mr. Banda”), submits this response to the “Registry’s observations on the ‘Second Update to ‘Associate Counsel’s Request to be appointed as Lead Counsel pursuant to Regulation 76 of the Regulations of the Court’”, (ICC-02/05-03/09-661-Conf-Exp)”, filed on 17 September 2019.<sup>1</sup>
  
2. Associate Counsel notes the Registry’s submission that in order for the power of attorney and appointment of counsel executed by video by Mr. Banda on 11 September 2019<sup>2</sup> to fulfil the requirements of Regulation 123(1) of the Regulations of the Registry (“RoR”), the video must be deemed “authentic and the consent expressed therein valid”.<sup>3</sup> Associate Counsel respectfully submits that sufficient documentation and information is available to the Registry in order for the Registry to authenticate the Appointment and Power of Attorney and confirm the validity of Mr. Banda’s consent expressed therein to the standards required by Regulation 123(1) of the RoR.
  
3. Notwithstanding the above stated position, and consonant with Associate Counsel’s prior relevant submissions,<sup>4</sup> Associate Counsel agrees with the Registry that “cognisant of the particular circumstances of the case at hand”, it is appropriate “for the Chamber to decide, in accordance with regulation 76(1) of

<sup>1</sup> ICC-02/05-03/09-662-Conf-Exp (“Second Registry Observations”).

<sup>2</sup> See video recording submitted as ICC-02/05-03/09-661-Conf-Exp-AnxI (“Appointment and Power of Attorney”) annexed to the Second Update to “Associate Counsel’s Request to be appointed as Lead Counsel pursuant to Regulation 76 of the Regulations of the Court”, 12 September 2019, ICC-02/05-03/09-661-Conf-Exp. A confidential redacted version of the filing was submitted today, 19 September 2019 (ICC-02/05-03/09661-Conf-Exp-Red) (“Second Update”).

<sup>3</sup> Second Registry Observations, para. 10.

<sup>4</sup> See Confidential Redacted Version of “Associate Counsel’s Request to be appointed as Lead Counsel pursuant to Regulation 76 of the Regulations of the Court” filed on 27 August 2019 (ICC-02/05-03/09-658-Conf-Exp), 19 September 2019, ICC-02/05-03/09-658-Conf-Exp-Red (“Regulation 76 Request”), para. 36; Confidential Redacted Version of “Update to ‘Associate Counsel’s Request to be appointed as Lead Counsel pursuant to Regulation 76 of the Regulations of the Court’” filed on 9 September 2019 (ICC-02/05-03/09-659-Conf-Exp), 19 September 2019, ICC-02/05-03/09-659-Conf-Exp-Red (“First Update”), para. 4; Second Update, para. 18.

the RoC, whether to appoint Mr Taku as Lead Counsel in the interests of justice”.<sup>5</sup> Associate Counsel accordingly maintains his request “that the Trial Chamber [] act under its own authority to acknowledge Associate Counsel’s appointment as Mr. Banda’s lead counsel before the Court”.<sup>6</sup>

## II. Classification

4. Pursuant to Regulation 23*bis* of the RoC this filing is classified as confidential and *ex parte* available only to the Counsel Support Section, Defence and Prosecution as it refers to information in confidential redacted versions of filings that are likewise classified.

## III. Submissions

5. Associate Counsel submits that sufficient documentation and information is available to the Registry – as provided in the Regulation 76 Request, First Update, Second Update (and annexes thereto), and the present response – in order for the Registry to authenticate the Appointment and Power of Attorney and confirm the validity of Mr. Banda’s consent expressed therein to the standards required by Regulation 123(1) of the RoR.
6. Associate Counsel appreciates, however, that the position and approach of the Registry, as the organ of the Court vested with the responsibility to authenticate and validate appointments of counsel and powers of attorney executed in favour of a particular lead counsel, must be articulated and applied on a standardized basis to all situations and cases before the Court.
7. In view of this mandate and “the particular circumstances of the case at hand”,<sup>7</sup> Associate Counsel submits that it is in the interests of justice, judicial economy,

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<sup>5</sup> Second Registry Observations, para. 11.

<sup>6</sup> Second Update, para. 18.

<sup>7</sup> Second Registry Observations, para. 11.

and preservation of the Court's resources where reasonable to do so,<sup>8</sup> for the Trial Chamber to determine this matter and acknowledge the appointment of Associate Counsel pursuant to Regulation 76(1) of the RoC. Such an approach, wherein the Trial Chamber exercises its inherent and broader discretion in the interests of justice, is both appropriate in the circumstances and preferable to embarking on potential further litigation directed at the legal standards applicable to authenticating and verifying a video executed appointment of counsel or power of attorney pursuant to Regulation 123(1) of the RoR, and the attendant additional processes and procedures (if any) that may arise and need to be undertaken in light of the Chamber's final determination on such litigation.<sup>9</sup>

8. Associate Counsel notes that the matter presently before the Trial Chamber is somewhat analogous to the situation faced by Pre-Trial Chamber I in this case, in respect of Mr. Banda, when evaluating the authenticity and veracity of the contents of Mr. Banda's written and signed request pursuant to Rule 124(1) of the Rules of Procedure and Evidence waiving his right to be present at his confirmation of charges hearing. The Pre-Trial Chamber, in view of all the relevant circumstances, accepted the authenticity and the veracity of the detailed contents of Mr. Banda's signed Rule 124(1) request and ordered the confirmation hearing to take place in Mr. Banda's absence,<sup>10</sup> [REDACTED].<sup>11</sup>
9. In the present circumstances, it is submitted that the Trial Chamber, in comparison to the Pre-Trial Chamber, is much better placed to consider and

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<sup>8</sup> See Situation in Afghanistan, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, 12 April 2019, ICC-02/17-33, para. 95 (recognizing that Chambers of the Court may take into account the optimal utilization of the ICC's limited resources in reaching a determination on issues before a Chamber).

<sup>9</sup> [REDACTED].

<sup>10</sup> Decision on issues related to the hearing on the confirmation of charges, 17 November 2010, ICC-02/05-03/09-103, para. 4.

<sup>11</sup> [REDACTED].

evaluate “the position of the accused person”<sup>12</sup> on a matter of similar importance in view of the video executed Appointment and Power of Attorney in which Mr. Banda speaks for himself in the only language that he fully understands and can communicate in,<sup>13</sup> and which does not have a written script.<sup>14</sup>

10. Associate Counsel further notes the Registry’s submission that “there is no information available to the Registry at this stage that would suggest that said consent [expressed in the Appointment and Power of Attorney] has been vitiated” and that “it has no reason to believe that Mr. Banda did not freely appoint Mr Taku as his Lead Counsel”.<sup>15</sup>
11. Associate Counsel additionally notes his obligation under Article 24(3) of the Code of Professional Conduct for counsel to not “deceive or knowingly mislead the Court”, and hereby avers that he has no knowledge or reason to believe: (i) that the individual appearing in and speaking on the Appointment and Power of Attorney is anyone other than Abdallah Banda Abakaer Nourain; and (ii) that the consent and approval provided by Mr. Banda for the appointment of Associate Counsel as his lead counsel is *not* genuine and voluntarily given.
12. In view of all the relevant submissions, information and very particular circumstances presented herein, as well as in the Regulation 76 Request,<sup>16</sup> First Update,<sup>17</sup> Second Update,<sup>18</sup> Registry Observations, and Second Registry Observations, Associate Counsel respectfully requests the Trial Chamber to act

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<sup>12</sup> Registry’s observations in relation to the legal representation of Abdallah Banda Abakaer Nourain, 9 September 2019, ICC-02/05-03/09-660-Conf-Exp (“Registry Observations”), para. 10.

<sup>13</sup> [REDACTED] Transcript of Initial Appearance, 17 June 2010, ICC-02/05-03/09-T-4-ENG ET WT, p. 6, line 20 to p. 7, line 2, p. 9, line 17 to p. 10, line 2 (wherein Mr. Banda, further to the questions posed by the Presiding Judge, stated that he does not speak Arabic very well); Transcript of Initial Appearance, 17 June 2010, ICC-02/05-03/09-T-4-ENG ET WT, p. 19, line 21 to p. 20, line 3 (stating the Prosecution’s position that Rule 76 disclosure would need to take place in the Zaghawa language).

<sup>14</sup> Second Registry Observations, para. 9.

<sup>15</sup> *Id.* at paras. 10-11.

<sup>16</sup> Regulation 76 Request, paras. 33, 34.

<sup>17</sup> First Update, para. 3.

<sup>18</sup> Second Update, paras. 12-16 and annexes thereto.

under its own authority and acknowledge Associate Counsel's appointment as Mr. Banda's Lead Counsel pursuant to Regulation 76(1) of the RoC, in the interests of justice.

Respectfully Submitted,



Chief Charles Achaleke Taku  
Lead Counsel for Abdallah Banda Abakaer Nourain

Dated this 11th Day of October 2019  
At Maryland, United States of America